for redistribution.[60] Significantly, however, neither MCI nor EchoStar/Directsat make any legitimate public policy argument to justify a 90 day divestiture period.[61] In sum, because of the enormous expense and effort required to acquire and maintain a DBS authorization, the Commission should provide a permittee with a reasonable period of time, such as eighteen months, to comply with any new structural regulations. A shorter period could result in significant disruption to the industry, and discourage qualified parties from competing aggressively at auction or proposing other relationships that could yield positive consumer benefits.

D. Given the Competitive Lead of DIRECTV and USSB, There Is No Basis for Retention, Much Less Expansion, of Exclusive Marketing and the Tempo II Restrictions.

The record provides compelling evidence that the Tempo II conditions and the NPRM's proposed marketing limitation (modeled on the PRIMESTAR state consent decree) for DBS firms affiliated with non-DBS MVPDs are no longer justified and

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[60] EchoStar/Directsat at 45.

[61] EchoStar/Directsat voice an unfounded fear that TEMPO Satellite, Inc., will be "disinclined to negotiate in good faith with them about assigning Tempo's current 119°W.L. channels...." EchoStar/Directsat at 45 n.21. To the contrary, EchoStar/Directsat apparently desire only to avoid paying fair market value for additional spectrum by inhibiting TEMPO's ability to enter into other arrangements. EchoStar/Directsat also claim that a non-DBS MVPD should not be allowed to choose its own buyer of excess channels. Any competitive concerns, however, are specifically addressed by other requirements: the buyer could not be controlled by the seller and would have to construct and operate its system in accordance with due diligence standards.

should not be extended in this proceeding. As discussed above, the comments indicate that the DBS industry has been radically transformed since the time of the Tempo II decision and the state consent decree by the entry and domination of independent DBS operators DIRECTV and USSB. As BellSouth observed, the restrictions that emerged from these early examinations of the DBS business came at a time when there were no competitive alternatives to cable service.[62] In this regard, TEMPO concurs wholeheartedly with Cox's reasoning that "[w]ith the success of DIRECTV and USSB, it is too late for cable operators to foreclose DBS competition by acquiring DBS systems and shifting them from a competitive service to merely an adjunct of their terrestrial cable systems."[63]

Furthermore, as BellSouth and a number of other commenters recognized, "cable operators face the prospect of significant competition from existing and potential DBS providers, as well as from cable overbuilders and other multichannel services such as wireless cable, video dial-tone, LMDS and SMATV."[64] The existence and continuing emergence of these alternative distributors leave MVPD-affiliated DBS

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[62] BellSouth at 6.

[63] Cox at 6; *see also* NCTA at 10-11. In any event, as BellSouth persuasively commented, in a marketplace that is characterized by at least three full-CONUS DBS competitors (in addition to other DTH and MVPD competitors), an MVPD-affiliated DBS operator that offered its DBS service on an ancillary basis or on different terms to its MVPD subscribers or that marketed its services exclusively through its MVPD affiliate would not have a material adverse impact on competition in the DBS industry or the MVPD market. BellSouth at 7-8.

[64] *Id.*; *see also* Continental at 14-16; Time Warner at 6; NCTA at 8.

operators with no choice but to compete as best they see fit.[65] Commenters generally concurred that in this era of increased MVPD competition the Commission should strive to avoid needless regulation and let competitors innovate and experiment to provide consumers valued MVPD services in the most economically efficient manner.[66] In short, TEMPO concurs with BellSouth that because the marketplace conditions that produced the restrictions no longer exist and will be but a dim memory in the future, the Commission should repeal, rather than extend, the restrictions.[67]

Those commenters who voiced support for the NPRM's proposed conduct restrictions did not offer any meaningful factual or analytical grounds for doing so. Casting a blind eye on the developments of the last three years, USSB asserts that "nothing has changed" since the Tempo II decision such that a DBS operator affiliated with a cable (or video dialtone) MVPD would have an incentive to compete vigorously in DBS.[68] Similarly, DIRECTV simply repeats the NPRM's thin rationale for

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[65] Significantly, as suggested *supra* in section II.A, the NPRM gave little or no consideration in its competitive analysis to the rapidly changing MVPD market conditions or to entry of new competitors that would assuage competitive concerns. *See* United States Department of Justice and Federal Trade Commission, *Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) at §§ 1.521 (agency may conclude that the historical market share of a firm overstates its future competitive significance), 3.2 (agency will consider timely entry alternatives that can be achieved within two years from initial planning to significant market impact).

[66] *See, e,g,* Time Warner 16; at NCTA at 3; CATA at 5.

[67] *Id.* at 6.

[68] USSB at 5-6.

extending the restrictions.[69] Like the NPRM, USSB and DIRECTV proceed from the mistaken premise that the market conditions obtaining at the time of Tempo II -- *i.e.*, the absence of any operational independent DBS operator -- still prevail. It entirely ignores the fact that DIRECTV and USSB have themselves initiated service and established themselves as industry leaders. As explained above, because these firms are capturing cable subscribers, DBS operators have a strong incentive to energetically compete. Accordingly, the proposed exclusive marketing and Tempo II restrictions are obsolete and should be abandoned.[70]

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[69] DIRECTV at 18; *see also* NRTC at 9-10.

[70] DIRECTV, NRTC and NYNEX argue that the NPRM's proposed conduct rules should be applied only to cable operator/DBS affiliates. DIRECTV at 13-15; NRTC at 9-10; NYNEX at 2-7; *see also* EchoStar/Directsat at 54-55 (advocating limiting the rules to DBS operators affiliated with dominant MVPDs and assessing arrangements with non-dominant MVPDs on a case-by-case basis). For the reasons stated above, TEMPO concurs with USSB (at 6) that there is no principled basis to single out TEMPO or cable operators from among other MVPD competitors for purposes of conduct restrictions. Indeed, because cable-affiliated DBS firms have strong incentives to vigorously compete against DIRECTV, USSB and others in the DBS business, the analytical predicate for differential treatment is lacking.

USSB urges the Commission to impose additional conduct restrictions that would prevent DBS operators affiliated with a non-DBS MVPD from the "tieing or combining" of DBS and cable service to create a single or discounted offering to the public. *Id.* at 6-7. USSB offers no reason why such a rule is necessary. Indeed, given the absence of complaints regarding any such action in the four years that PRIMESTAR has been operational USSB's proposal should be rejected because it is targeted at a purely speculative activity with no alleged economic harm.

E. A Broad Spectrum of Commenters Concurred that the NPRM's Ill-Considered Program Access Proposals Are a Solution in Search of a Problem.

Predictably, the NPRM's program access proposals have created a regulatory "feeding frenzy" as a variety of commenters transparently seek to gain a competitive advantage through the regulatory process. What emerges from the muddled record are two salient points: (1) the NPRM's fears of vertical foreclosure are completely unfounded given that non-cable MVPDs are experiencing no problem in obtaining access to the programming of firms affiliated with DBS operators and with cable interests; and (2) this rushed proceeding is the wrong place and wrong time to revisit the program access rules in response to the disparate claims of various special interests.

Telephone, independent DBS, and cable-affiliated DBS operators agreed that there is no current problem with program access and thus no need for FCC action. MCI commented that the Commission, in implementing its program access rules, opted to adopt a case-by-case approach to addressing program access problems, rather than adopt overly broad *per se* prohibitions of the sort proposed in the NPRM.[71] TEMPO concurs that the FCC's rules are sufficiently flexible to allow it to address any of the NPRM's concerns -- when and if they materialize -- without the precipitous step of adopting new and unnecessary regulations that have the potential to impede the creation

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[71] MCI at 19-20 (citing Program Access Rules First Report and Order on Reconsideration, 76 R.R.2d 1177, 1187 (1994)).

of programming for DBS and reduce the originality and value of the service.[72] Similarly, USSB commented that the Commission's current program access rules "appear to be sufficient to remedy any improper conduct."[73] USSB urges the Commission to refrain from adopting additional rules in the absence of a factual record.[74]

Ironically, DIRECTV urges the Commission to supplement the program access rules to "condition the award of any DBS license to a cable-affiliated entity on the DBS licensee not entering into any DBS-exclusive programming agreements."[75] As NCTA, Time Warner, and Continental Cablevision noted, however, DIRECTV -- free as it is from program access restrictions -- has obtained exclusive rights to National Football League, National Basketball League, and National Hockey League games.[76]

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[72] *See* Time Warner at 12 (vertical integration in the programming market produces numerous cost efficiencies and facilitates the development of high-quality original programming); PRIMESTAR at 30-31 (the Commission recognized that exclusivity for DBS operators may expand consumer choice and result in more efficient use of the spectrum); NCTA at 12 (same).

[73] USSB at 9-10; *see also* NCTA at 12; Cox at 9-10; PRIMESTAR at 30; Continental Cablevision at 16-17; Time Warner at 14 (Noting that non-MSO affiliated DBS operators "have freely advertised that they carry all the programming that cable operators currently provide and more, including vertically integrated cable program services.").

[74] *Id.*

[75] DIRECTV at 20.

[76] NCTA at 12; Time Warner at 15; Continental Cablevision at 17.

DIRECTV's proposal to stop other competitive DBS providers from entering into similar arrangements is a shameless attempt to handicap its competitors.

The similarly self-serving calls of other commenters for various and sundry modifications or extensions of the program access rules are bereft of empirical or analytical support. EchoStar/Directsat and BellSouth argue that the Commission's program access rules should apply to programmers that are not affiliated with cable operators.[77] Yet neither EchoStar/Directsat nor BellSouth presents *any* evidence in support of their contentions. This failure is fatal given the evidence, noted in the comments of Cox, that many non-affiliated programmers have freely contracted with cable's terrestrial competitors, as well as DIRECTV and USSB.[78] Moreover, TEMPO questions the existence and gravity of the harm alleged by EchoStar/Directsat and BellSouth in view of the silence of other independent DBS operators on this topic.[79]

EchoStar/Directsat also argue that the Commission's program access rules allow affiliated programmers to engage in discriminatory pricing against DBS providers by claiming fictitious cost differentials or economies of scale.[80] Specifically,

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[77] EchoStar/Directsat at 48-49; BellSouth at 8-9.

[78] Cox at 10.

[79] Contrary to the facile assertions of EchoStar/Directsat, the Commission clearly lacks authority under the 1992 Cable Act to regulate programmers that are not affiliated with cable operators. *See* NCTA at 13 (citing 1992 Cable Act at Section 2(a)(5) (finding only that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators).

[80] EchoStar/Directsat at 51-53.

EchoStar/Directsat propose that the Commission specify that: (1) "the burden of showing cost differences or economies of scale lies squarely on the programmer"; and (2) where the programming vendor has to transmit its signal to more than three headends, "there is an irrebuttable presumption that the programmer's costs in transactions with cable systems are not lower than the cost of dealing with satellite distributors."[81]

As with the "monopsony" argument, EchoStar/Directsat are clearly in the minority in their view that there is a problem with the current operation of the programming market. There is no record evidence of discriminatory conduct by cable-affiliated programmers of the kind alleged. In any event, TEMPO doubts whether these allegations can be critically examined in a thoughtful manner in this fast-track proceeding. Accordingly, TEMPO believes that the FCC should reject the proposals of EchoStar/Directsat or, if anything, defer consideration of the issues raised until a later date when a sufficient record can be assembled.[82]

American Satellite Network, Inc. ("ASN") shamelessly asks the FCC to limit a DBS operator's carriage of program services in which it has an attributable interest to 40% of its channel occupancy or, alternatively, require a "set aside" of 10% of DBS channels subject to auction for "independent" programmers.[83] In support of these

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[81] *Id.* at 53-54.

[82] NRTC uses this proceeding to repeat arguments already made and rejected in the Commission's program access docket. NRTC at 5-9.

[83] Comments of American Satellite Network, Inc. at 6, 8 ("ASN").

actions, ASN makes the wholly unsupported contention that a cable-DBS entity "could deter satellite programmers with no attributable ownership in cable systems . . . from distributing their programming through other DBS operators" through a variety of imagined evils.[84] It is unclear to TEMPO how this would happen, especially in a DBS industry lead by independent DBS operators. Indeed, ASN's argument is totally undermined by the fact that DIRECTV currently carries ASN's independent PrimeTime 24 service.[85] Given that PRIMESTAR's existence has not impeded in the least the ability of this service to gain carriage, TEMPO urges the Commission to reject ASN's proposals for what they are: an attempt to advance their business agenda through the regulatory process by cloaking their *self* interests in *public* interest rhetoric. In any event, it is plain that ASN's channel occupancy and channel set-aside proposals are constitutionally infirm.[86]

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[84] *Id.* at 3.

[85] *See id.*

[86] Congress included a DBS channel set-aside in the 1992 cable act. The set-aside was rejected by the court on First Amendment grounds after a finding of "absolutely no evidence in the record" that such a requirement would service "any significant regulatory or market-balancing interest." Daniels Cablevision, Inc. v. United States, 835 F.Supp. 1, 8 (D.D.C. 1993), *appeal filed and order to show cause issued*, 40 F.3d 474 (D.C. Cir. 1994) (rejecting set-aside for educational programming on First Amendment grounds). In that case the court noted a complete absence of any legislative finding of anticompetitive conduct by DBS operators. *Id.* Similarly, there is no evidence of anticompetitive conduct by cable-affiliated DBS operators that would justify the speech burdens associated with an independent programmer's set aside or DBS channel caps.

F. DIRECTV's Ad Hoc Proposals for "Pre-Conditions" to the Participation of Cable-Affiliated Firms in the Auction Are Groundless and Should Be Rejected.

DIRECTV urges the Commission to impose a laundry list of "pre-conditions" to allowing a cable-affiliated entity to bid for ACC's channels.[87] These conditions, which DIRECTV concocted and submitted to the Commission in its campaign to stop PRIMESTAR from becoming a full-fledged competitor, obviously are derived from the competitive safeguards applied to the Regional Bell Operating Companies. As such, they are ill-suited to the MVPD market and -- to the extent they go beyond the NPRM's proposals -- bear little or no rational relationship to any identified competitive concerns. Indeed, the conditions address concerns that are more imagined than real. For example, neither DIRECTV nor any other commenter has presented evidence that MSOs and affiliated DBS operators have used "proprietary" information in an anticompetitive fashion or that PRIMESTAR has or can engage in anticompetitive cross-subsidization.

Underscoring their fear of increased competition, DIRECTV and USSB urge the Commission to require cable-affiliated DBS operators to buy programming (and equipment) independent of their cable affiliates.[88] TEMPO opposes any effort to disturb the standard industry practice of negotiating for volume discounts in the

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[87] DIRECTV at 20.

[88] DIRECTV at 19; USSB at 7.

purchase of programming or other supplies. This is an efficient marketing practice that reflects a programmer's desire to maximize its penetration and reduced transaction costs made possible by selling high volume. The cost savings realized by distributors when such economies are present serve as the basis for lower prices to consumers. Indeed, as Dr. Owen has observed, "pricing to take advantage of lower costs is the very essence of competitive pricing."[89] Both the 1992 Cable Act and the Commission's rules recognize that volume discounts benefit programmers, distributors, and consumers.[90] The claims by DIRECTV and USSB to the contrary lay bare their desire to thwart heightened competition in the DBS industry. Accordingly, the FCC should reject their proposals.[91]

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[89] November 1994 Owen Declaration (attached to the Comments of TEMPO in this proceeding) at ¶ 23; *see also* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 118 (1986) (price competition is not anticompetitive).

[90] *See* 47 U.S.C. § 548(c)(2)(B)(iii) (Vertically integrated programmers are not prohibited from "establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."); 47 C.F.R. § 76.1002 (same).

[91] DIRECTV's economist also advocates FCC adoption of two other conduct proposals related to programming: (1) prevent cable-affiliated DBS operators from using "tied deals" or other "discriminatory conduct" to get low prices in acquiring programming (Hausman Declaration at 12); and (2) prohibit the sharing of "proprietary information" (information presumably related to programming decisions) between an a vertically-integrated MSO and an affiliated DBS operator. *Id.* These proposals are so unclear as to elude meaningful comment. In any event, they appear to lack any factual or analytical predicate and therefore should be rejected.

III. "WHOLESALE DBS SERVICES" DO NOT CONSTITUTE A MARKET, AND NO ACTION BY THE COMMISSION IS REQUIRED TO PROTECT AGAINST POTENTIAL ABUSES.

The various comments relating to so-called "wholesale DBS services" illustrate both a lack of factual understanding of this issue and the usual willingness of those with a competitive ax to grind to use the Commission as a handy sharpening wheel. Such attempts to use the regulatory process to further parochial self-interest unfortunately are not surprising, but what is more difficult to understand is DOJ's apparent failure to get the facts straight before it offers a policy solution -- and its eagerness to attempt to head off speculative competitive problems in a business that does not yet even exist by imposing a regulatory straightjacket that may choke off the development of a new market before it even gets started.

The response to the various comments needs to begin with a basic fact: There is no such thing as a "wholesale DBS market." The NPRM contributes to the obvious confusion on this point by seeking comment on the proposed regulation of the "wholesale use of DBS resources to provide digital programming directly to cable operators and other MVPDs."[92] While the word "wholesale" in this context is simply superfluous,[93] the NPRM then mistakenly characterizes the services provided through

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[92] NPRM at ¶ 62.

[93] It is comparable to talking about "wholesale" cable service; *i.e.*, the provision of compression, digitalization, encryption, etc. to cable operators.

HITS, the "Headend in the Sky" to be offered by TCI, "as the wholesale provision of digitized programming".[94]

As emphasized in TEMPO's initial comments, HITS does not involve the provision of digitized programming, by wholesale or retail distribution. If and when there is a demand for such services, HITS will provide authorization and transport services for use by cable operators and other MVPDs in the provision of programming services to their customers. Programming will continue to be provided to the cable operator or other MVPD by the programmer, not by HITS. Thus, the only markets in which HITS will compete are the markets for the provision of authorization and transport services.

Most of the commenters offering suggestions about HITS services apparently are confused about the nature of the service.[95] The DOJ seems to have a better understanding of the basic points, but then ignores them in undertaking its product market definition -- a process that is (as the DOJ recognizes) a critical precondition to determining the likelihood of the existence or exercise of market power. The DOJ properly identifies the possible benefits of the HITS service to smaller MVPDs, and the ensuing procompetitive benefits to the MVPD marketplace.[96] But then, without

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[94] NPRM at ¶ 61.

[95] *See, e.g.*, BellSouth at 9; ASN at 6-8; DIRECTV at 21; EchoStar/Directsat at 55-56.

[96] DOJ at 12.

reason, the Department identifies various barriers to entry into the provision of such services based on the purported scarcity and high cost of DBS spectrum.

The only possible explanation for this approach would be if DBS spectrum is an essential facility for the authorization and transport services that make up HITS, but this is simply and demonstrably wrong. Indeed, looking at the specifics of the HITS proposal establishes this fact. When HITS is launched next year, it will utilize a combination of K-band and C-band FSS satellites to provide transport services.[97] At least initially, it will not rely on any DBS spectrum.

Transport is simply a signal delivery mechanism, and it is available from so many possible sources that scarcity obviously can not be an issue.[98] An equal array of options exists for the provision of authorization services. Since the authorization code is an out of band signal, it can be delivered to a MVPD through any one of a number of means. In addition to DBS satellite delivery, these include non-DBS satellites (FSS and C-Band), telephone lines or VSAT terminals.[99]

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[97] TEMPO's arrangement to initiate HITS on FSS satellites, by itself, demonstrates the error in the DOJ's conclusion that only the three full-CONUS DBS slots are suitable facilities.

[98] A number of programmers currently offer digitally compressed signals, including Encore, HBO, Request, Viewers' Choice, and others. Many additional video programmers will likely decide to digitally compress signal transmission in their existing satellite transponders in order to achieve additional capacity.

[99] There are a large number of existing and potential suppliers of such services. General Instrument currently operates an authorization center in San Diego that consolidates the authorization streams of numerous C-band distributors. MVPDs, like DIRECTV, USSB and PRIMESTAR, authorize their own customers. In addition, any

(continued...)

Thus, entry into the authorization or transport markets -- which are the only relevant markets involved here -- is neither prohibitively expensive nor difficult. It does not require access to transponders on a high-power DBS satellite, and it need not be, to use DOJ's words, "comprehensive and on a large scale."[100] Nor are the number of potential entrants "severely limited" (DOJ at 13); any programmer that distributes its product via satellite could provide "wholesale" transport services.[101] Authorization could be provided by an even larger number of suppliers, including all those engaged in satellite distribution of video programming and many who are not.[102]

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[99](...continued)
cable system, MVPD or group of MVPDs can use addressable controllers, currently available from a large number of commercial sources, to perform authorization functions for their customers. Of these potential sources of authorization services, only DIRECTV/USSB utilize DBS spectrum.

[100] Comments at 13. The DOJ does not explain the basis for this conclusion. Because it is exceedingly unlikely that a MVPD would ever receive all transport services from a single satellite and because authorization does not have to be delivered with the programming signal itself, there do not appear to be economies of scope in connection with the provision of these services.

[101] *See* note 93 *supra*. It also is and will be possible to obtain the various elements necessary to provide transport services from a wide variety of sources. For example, to the extent program production, play back, post-production, and other services are required to provide transport services, these capabilities can be obtained from numerous suppliers. Uplinking services can be obtained from companies such as Micronet, HBO, GE Americom, Group W Satellite Communications, Rainbow, TBS, and numerous other entities. Satellite transponder capacity is not limited to the DBS spectrum and can be obtained from GE Americom, Hughes Communications, AT&T, and others.

[102] For example, General Instrument now provides authorization services to C-Band distributors for use in their retail sales; with the proper investments in computer equipment and software, General Instrument could certainly provide authorization services to MVPDs. In addition, as noted, authorization services could be provided via telephone lines or other fiber optic links.

Thus, it is likely that HITS will not be the only "packager" of such services. As just one example, TVN Entertainment, a satellite provider of near-video-on-demand services, announced at the recent Western Cable Show that it planned to launch a digital delivery system in 1996 to help cable systems offer increased programming choices comparable to those of DBS providers like DIRECTV. TVN President/CEO Stuart Levin was quoted as saying:

> We have the whole infrastructure [to launch the service.] We have satellite capacity, uplink, playback, encryption control, conditional access, scheduling software, billing, royalty administration, collection: on and on. All that stuff's in place -- we've taken all that and added this new digital box, which basically offers a digital tier to consumers.[103]

As a consequence, the essential building block on which the DOJ analysis rests -- scarcity -- simply doesn't exist. The DOJ's concerns with barriers to entry are equally unsupported. There are no significant barriers to entry over and above the necessary capital investments that would face any entrant. There is no particular limitation on the number or type of entrants; for the reasons described above, they certainly do not have to be DBS providers. Thus, there is no reason to believe that anyone will have significant market power in either the authorization or transport markets, not to mention in the non-existent "wholesale DBS services" market.

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[103] Glen Dickson, "TVN Launches Digital Cable Delivery," Broadcasting & Cable 95 (Nov. 27, 1995). In addition, EchoStar/Directsat, which recently applied for launch authority (FCC File No. 15-SAT-MP/LA-96), reiterated its desire to provide HITS-type services. EchoStar/Directsat at 55.

Because there is no market in which market power is likely to exist or be exercised, there are by definition no competitive concerns. Absent market power, no provider of authorization or transport services could impair competition in those services. As a result, the DOJ's competitive concerns -- which are premised on the likely existence of market power in a wholesale DBS "market" -- are not only not persuasive; they are just plain wrong. If "wholesale DBS providers" do not provide programming, as DOJ concedes, and if there are many potential providers of authorization and transport services, as is demonstrably the case, there is no principled basis for concern that these structurally competitive markets will not be competitive.

Rules to protect against abuse of market power should be based on a clear demonstration that such power exists or is extremely likely to develop, and that market forces will not likely dissipate it or prevent its exercise. Market power is frequently ephemeral; government regulation generally is not and historically is much more dangerous. There should be a strong showing of need before markets, particularly technologically and commercially dynamic markets such as those involved here, are constrained by government regulations. Not only is that showing not present here, but the critical conditions precedent to such a showing cannot be made. The Commission should not allow itself to be misled into unnecessary and dangerous regulatory intervention in markets not even yet in existence, either by those who seek to advance their private competitive interests or who are wrong on the facts and exceedingly short on analysis.

Even the DOJ suggests that its rule, if adopted, should be revisited in the near future, because "predictions as to how these markets may evolve are necessarily imperfect, in light of uncertainty about future changes in technology and market forces."[104] This acknowledged doubt, however, compels preservation, rather than regulation (even for a limited time), of the free market. The Commission should avoid this unwarranted burden on its own resources by rejecting calls to intervene and impose rules seeking to address speculative competitive problems in a nonexistent market.

IV. THE COMMISSION SHOULD ENSURE THAT DBS FREQUENCIES ARE USED TO PROVIDE DBS SERVICES.

The extraordinary demand for DBS services is evident in this proceeding. Existing service is proliferating rapidly, numerous parties have expressed interest in the frequencies at 110°W, and to keep pace with demand the Commission proposes to acquire additional orbital resources for domestic use. Nevertheless, despite significant flexibility already permitted regarding the use of DBS facilities, some commenters ask the Commission to abandon its policy of allowing non-DBS services to be offered only on an ancillary basis.[105] There is no reason to depart from this practice.

The Commission's policy, which was adopted years before the commencement of the first DBS system, was intended to encourage the development of new services

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[104] DOJ at 18.

[105] *Id.* at 18-19; DBSC at 15; MCI at 8-9; NRTC at 10; USSB at 2-5.

through flexible service offerings. The Commission made clear, however, that it would avoid a de facto reallocation of spectrum for FSS services, and "absolutely minimize" the potential for a party to use the frequencies primarily to offer a non-DBS service.[106] MCI, however, seeks just that result.

Contrary to Commission policy of encouraging maximum DBS service and competition, MCI urges the Commission to authorize non-DBS uses as long as "minimum DBS service requirements are observed."[107] MCI also asks the Commission to abandon even the existing temporal restrictions for subsequent license terms because after devoting significant DBS resources to provide non-DBS services, customer relationships would be disrupted if MCI were required subsequently to use its satellites as originally authorized.[108] According to MCI, this fear of uncertainty about the use of spectrum "would likely have a negative effect on the value of the spectrum at the time of auction."[109]

The Commission should reject outright the proposal to relax further its already liberal use policy. Such a change would result in precisely the de facto reallocation the Commission wisely rejected years ago, depriving consumers of valuable DBS services. Especially where demand for DBS services is widely acknowledged, the need to

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[106] *See* TEMPO at 32.

[107] MCI at 9.

[108] *Id.*

[109] *Id.*

increase non-DBS uses is greatly diminished. Moreover, whether the spectrum may be worth less to MCI than it committed to bid because it must provide DBS services (except on merely an ancillary basis) is irrelevant. Section 309(j)(7) of the Communications Act prohibits the Commission from prescribing regulations "solely or predominantly on the expectation of Federal revenues . . . ."[110] Thus, the Commission can best promote competitive DBS services not by reallocating DBS frequencies or imposing the burdensome service restrictions proposed by MCI and others, but by committing DBS frequencies to be used primarily for DBS service.[111]

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[110] 47 U.S.C. § 309(j)(7). MCI similarly implores the Commission not to seek additional orbital resources for domestic use because that may "substantially alter significant operational and economic assumptions concerning use of the spectrum." MCI at 16. If MCI simply desired to use DBS frequencies to provide DBS services, as all potential providers should, the potential for increased orbital slots would be irrelevant to its "assumptions concerning use of the spectrum."

[111] See GE at 20; PRIMESTAR at 13-17; and TEMPO at 32-34.

V. CONCLUSION

The record in this proceeding confirms that no basis exists to preclude or impede the ability of cable-affiliated DBS operators to compete vigorously against the well-entrenched DBS incumbents. The comments underscore that the "competitive concerns" on which the NPRM sought comment are in truth nothing more than the predictable grousing of competitors seeking to obstruct the full-fledged entry of highly competitive firms. This fact should not be surprising given that the concerns were derived almost verbatim from petitions to deny the ACC/TEMPO transaction filed by DIRECTV, USSB and EchoStar/Directsat.

Despite the somewhat misguided approach of the NPRM, however, the record in this proceeding is valuable because it definitively deflates competitors' "concerns" as simply so much hot air. Indeed, the record contains compelling evidence that the incumbent independent DBS operators have experienced explosive growth even while PRIMESTAR has been competing vigorously with a medium power FSS satellite. Given this empirical evidence, there is absolutely no need for the Commission to handicap cable-affiliated DBS competitors. Moreover, knee jerk theories that cable-affiliated firms lack incentives to compete fatally ignore the existence of independent DBS competitors that are capturing cable subscribers. Simply put, cable-affiliated firms would not rationally invest well over $1 billion in DBS and then cede cable subscribers to DBS competitors by attempting to suppress competition in DBS.

As documented in the comments, the DBS industry is distinguished by numerous able competitors and is on course to become a highly competitive niche in the MVPD market. Accordingly, consumers would be best served by FCC rules that apply equally to all DBS operators and that permit the benefits of unfettered competition to flourish.

Respectfully submitted,

TEMPO DBS, Inc.

By: David P. Beddow

David P. Beddow
President
4100 E. Dry Creek Road
Littleton, CO 80122
(303) 486-3800

November 30, 1995

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of: Revision of Rules and Policies for the Direct Broadcast Satellite Service	}	IB Docket No. 95-168 PP Docket No. 93-253

Supplemental Declaration of Bruce M. Owen

1. I am an economist and president of Economists Incorporated, an economic consulting firm located at 1233 20th Street, N.W., Washington, D.C. 20036. I previously filed a declaration in this proceeding at the request of TEMPO DBS, Inc. ("TEMPO"), which is a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"), addressing the economic issues raised by the Commission's Notice of Proposed Rulemaking. Previously I had filed two declarations analyzing the economic issues raised by TEMPO's application to acquire Advanced Communications Corporation's direct broadcast satellite ("DBS") authorizations (FCC File No. DBS-84-01/94-15-ACP), and to consider allegations made in various Petitions to Deny by existing and potential DBS competitors that that assignment would result in competitive harm. I have been asked to respond to issues raised by the Comments of the United States Department of Justice ("DOJ"). My earlier declarations address the claims made by TEMPO's DBS competitors and will not be repeated here.

2. DOJ proposes a structural rule that would prohibit the acquisition of channels at any of the three full-CONUS DBS slots by cable television firms, or by combinations of cable television firms, that control serv-

ice to a "large" share of the nation's cable subscribers. The Department suggests that 10 percent of the Nation's cable subscribers would constitute a "large" share; this corresponds at present to about 6.5 percent of all TV households.

3. According to DOJ, a DBS operator affiliated with cable systems will not use its DBS service to compete aggressively in the MVPD market because of its incentive to protect its profits in the cable business. In other words, DOJ argues that the programming and marketing of the DBS service will be altered in such a way as to take account of the adverse impact of such marketing on profits from existing cable service. Further, DOJ conjectures that the "incentives of a cable-controlled DBS firm to restrain output and set higher prices could well reduce the incentives of the other two [DBS operators] to compete vigorously" (DOJ Comments at 6).

4. These concerns appear to be greatly exaggerated. DOJ's analysis of the incentives of a cable-operator-owned DBS service ignores, or gives too little weight to the following considerations:

5. First, DOJ has greatly exaggerated concentration in the relevant market. Even assuming it is true that there are only three "desirable" orbital slots that can "see" all of the CONUS, that does not mean that other slots have zero competitive significance. Further, just as DirecTV and USSB compete in marketing their services even though they cooperate in certain aspects of supply, the frequencies at the other orbital slots have been allocated in such a way as to provide for more than three competitors. That these competitors may well cooperate in certain respects in order to minimize production costs does not mean they lose all competitive significance as independent entities. Finally, as I have previously discussed, there are a number of other MVPDs. In particular, local exchange telephone carriers have shown the strongest possible interest in providing multichannel video service, though their choice of technology is still in doubt.

6. As to the Department's concern with incentives, even the largest cable operators account individually for less than a quarter of all cable sub-

scribers; it would make little sense for them to lose market share in seventy five percent or more of the DBS market in order to protect cable profits in their franchise areas. Put differently, DBS operators will be in competition with each other and with cable operators outside their own franchise areas for a national audience; that competition will have to generate market share and profits sufficient to justify the very large initial investment required for a facilities-based DBS operation. It would not take very much deviation from the optimal competitive strategy in the DBS business to produce a loss far greater than the cost in lost cable profits of a marketing strategy that competes directly with cable.

7. Further, a strategy that avoids or minimizes direct competition with cable is unlikely to be effective because it simply makes all the more attractive a strategy on the part of the *other* DBS competitors to target existing cable subscribers.

8. By the same token, even if it did make sense to alter DBS programming, pricing, and marketing behavior nationwide in order to protect the local cable profits of a DBS owner, the very fact that DBS service has become economically viable means that the MVPD business is much more competitive. In these circumstances, there may be no cable profits to protect. In other words, if DBS service is to be a competitively significant source of video service to television households, it will be in part because DBS operators have succeeded in taking a substantial market share away from existing cable operators, a process that will greatly reduce or eliminate whatever market power cable operators have today. In that case a cable-affiliated DBS service provider would have the same incentives to compete aggressively as an independent DBS provider.

9. In this context, even of it were true that a cable-operator-owned DBS service had different incentives than one not so owned, that fact would have no significance from the point of view of competition policy. Many competitive markets are served by firms that produce a "line" of products linked on the demand or supply sides, or both, and whose marketing strategies are affected by these linkages. There is no